Part 6 Agency CHAPTER 20 Agency and Liability to Third Parties Page 464 CASE OPENER FedEx and Independent Contractors In July 2006, the International Brotherhood of Teamsters, Local Union 25, filed two petitions and held an election for a collective bargaining representative at two FedEx locations. However, FedEx refused to bargain with the union. FedEx did not contest the vote count of the election; instead, FedEx refused to bargain collectively because it believed that its single-route drivers were not employees but, rather, independent contractors, and the rules of collective bargaining in this situation apply only to employees. However, the National Labor Relations Board concluded that FedEx committed an unfair labor practice by refusing to bargain with the union certified as the collective bargaining representative of the drivers. FedEx sought judicial review of the decision of the board, and the board cross-applied for enforcement of its order requiring the company to bargain. Do you agree with the National Labor Relations Board's ruling that FedEx engaged in an unfair labor practice? Why? What duties and rights would the FedEx drivers have if they were considered employees? How would their duties and rights differ if the drivers were considered independent contractors of the company? LEARNING OBJECTIVES LO 20-1 Describe how an agency relationship is created. LO 20-2 Recognize the different types of agency. LO 20-3 Identify the different types of agency relationships. LO 20-4 Describe the duties of the agent. LO 20-5 Describe the duties of the principal. LO 20-6 Identify the different types of authority of the agent. LO 20-7 Explain the contractual liability between the principal and the agent. LO 20-8 Outline the ways an agency relationship can be terminated. Page 465 In the Case Opener, it is important to determine whether single-route drivers are employees or independent contractors of FedEx because different legal obligations arise, depending on the nature of the relationship. One of the most important relationships in the business world is the agency relationship, in which the employee may be an agent of the employer, having the ability, among others, to bind that employer legally. Agency relationships are crucial to running large businesses because the use of agents allows corporations to enter into contracts and therefore conduct business in multiple locations simultaneously. This chapter explores the nature and creation of the agency relationship as well as the legal obligations that the parties take on when they form such a relationship.

Introduction to Agency Law Agency is generally defined as a relationship between a principal and an agent. In an agency relationship, the agent is authorized to act for and on behalf of the principal, who hires the agent to

represent him or her. The Restatement of Agency defines agency as “the fiduciary relation that results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.”1 (A fiduciary is a person who has a duty to act primarily for another person’s benefit. A lawyer, for example, is a fiduciary for their client. We discuss fiduciaries in depth later in this chapter.) Agency law exists because we are all aware that complex market activities involve multiple parties, each with particular rights and responsibilities. Individuals, regardless of how skilled they are, require cooperative arrangements to perform the multiple elements of a market transaction. The ground rules for these transactions spell out the roles and liabilities of principals, agents, and those with whom they contract. Agency law creates predictability of responsibilities enabling these parties to collaborate effectively. Consequently, it lays the foundation for the various forms of business organization discussed in the next chapter. Agency law is primarily state law. Thus, it can vary somewhat from state to state. As of July 2010, 40 states had enacted statutes governing the behavior of sports agents. The specific legislation that regulates the conduct of athlete agents in these 40 states is the Uniform Athlete Agents Act (UAAA). Non-UAAA laws also regulate athlete agents in California, Michigan, and Ohio. The UAAA provides for criminal, civil, and/or administrative penalties based on the particular state’s statute. Twenty-three of those states impose civil penalties or damages on the agent for violations of the athlete agent statutes. Twenty-four states (including California and Florida) have established criminal penalties for sports agents who violate the state statute. In contrast, only five states have criminalized violations of the statute by the athletes themselves. In addition to state laws protecting athletes and agents, players associations’ model contracts describe the nature of the services agents can perform on behalf of their principals and the duties the parties owe to one another. For example, the Major League Baseball Players Association’s (MLBPA’s) “Regulations Governing Player Agents” expressly states that agents act in a fiduciary capacity vis-à-vis their athlete clients. Agency law is especially important for modern firms doing business in foreign countries. Although foreign countries offer fresh markets and eager consumers, American companies often run into legal difficulties due to language barriers or lack of knowledge about local laws. To avoid such problems, many companies hire agents familiar with local laws, customs, and customers to help them function smoothly in foreign markets.

Creation of the Agency Relationship LO 20-1 Describe how an agency relationship is created. Agency relationships are consensual relationships formed by informal oral agreements or formal written contracts. However, an agency relationship exists only when the principal takes action to ask another individual to act on behalf of the principal. Page 466 Under what circumstances can an agency relationship be created? First, an agency relationship can be created only for a lawful purpose in the same way that a contract cannot have an illegal purpose. Thus, a principal could not hire an agent to kill someone on behalf of the principal.2 Second, almost anyone can act as an agent. A contract made by an agent is viewed as a contract between the principal and a third party. Therefore, a person can serve as an agent regardless of age or competency.3 However, if an individual does not have contractual capacity, they could not hire an agent to make contracts on their behalf. For example, because a contract entered into by a minor is voidable, most states do not allow minors to hire agents. LO 20-2 Recognize the different types of agency. As long as these two criteria are met, agency relationships can be created on the basis of any of the following four forms of authority: By express agency, or agency by agreement. By implied authority. By apparent agency, or agency by estoppel. By ratification. The following sections discuss the types of agency formation, and Exhibit 20-1 presents a summary. Exhibit 20-1Creation of Agency Relationships Express agency Formed by making a written or oral agreement Implied authority Formed by implication through the conduct of the parties Agency by estoppel Formed when a principal leads a third party to believe that another individual serves as their agent but the principal had made no agreement with the so-called agent Agency by ratification Exists when an individual misrepresents themself as an agent for another party and the principal accepts or ratifies the unauthorized act Express Agency (Agency by Agreement) When parties form an agency relationship by making a written or oral agreement, the agency is known as express agency, or agency by agreement. Express agency is the most common type of agency. As specified in the expressed agreement, the agent has the authority to contract on behalf of the principal. Although a contract is not necessary, if an agency agreement is formed through a contract, the contract must meet all the elements of a contract discussed in Chapter 9. If a principal agrees to hire no other agent for a period of time or until a particular job is done, the principal and agent have entered into an exclusive agency contract. One legal document that establishes agency relationships is a power of attorney, a document that

gives an agent authority to sign legal documents on behalf of the principal. Power of attorney can be classified in several ways. First, a power of attorney can be general or specific. For example, with a general power of attorney, a principal gives an agent broad authority to sign legal documents on behalf of the principal. In contrast, with a specific power of attorney, a principal gives authority to an agent for only the specific areas or purposes listed in the agreement. Powers of attorney are often given for business and health care purposes. In the health care instance, a principal gives power of attorney to an agent so that the agent can make decisions about the principal's medical care in case the principal cannot make those decisions. Given that a principal must have the ability to enter into contracts to enter into an agency relationship, a principal may not enact a power of attorney after becoming incompetent. Therefore, before incapacitation, a principal may create a durable power of attorney. A durable power of attorney is a written document, created by a principal, expressing their wishes for an agent's authority to be unaffected by the principal's subsequent incapacity. Alternatively, a durable power of attorney might become active only after a principal becomes incapacitated in any manner. Because the agreement is entered into before incapacitation, a power of attorney is legally binding after the principal becomes incapacitated. Page 467 CASE Nugget Durable Power of Attorney Penny Garrison et al. v. The Superior Court of Los Angeles et al. 132 Cal. App. 4th 253 (2005) On Ella Needham's request, her daughter, Penny Garrison, was designated Needham's agent through a durable power of attorney. Needham was later admitted to a residential care facility. As part of the admissions process, Garrison, acting under the durable power of attorney, executed two arbitration agreements. After Needham's death, Garrison and Needham's other daughters sought to sue the facility for a number of concerns the family had regarding the care their mother had received. The facility sought to enforce the two arbitration agreements. However, the family contended that the agreements were unenforceable because Garrison could not legally enter into them. The durable power of attorney had given Garrison power to (1) make all health care decisions for Needham according to what she believed was in Needham's best interest and (2) make decisions relating to Needham's personal care, including but not limited to determining where she lived. Therefore, Garrison was legally in charge of picking the residential care facility, and she had the power to enter into agreements regarding Needham's care. Nowhere in the enumerated legal powers did the durable power of attorney state that Garrison could not enter into arbitration clauses. Moreover, the arbitration clauses were optional to the original contract, and they allowed a 30-day period during which

Garrison could cancel them. Because the durable power of attorney was legal and enforceable, Garrison could not cancel the agreements into which she entered. It is important to note a few additional points. First, the Restatement states, “[A]n agency relation exists only if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act.”4 Therefore, in addition to the preceding criteria, there needs to be agreement by the principal to have the person act as an agent and by the agent to act for the principal. As noted shortly, this agreement can be reached in several ways. Second, agency agreements usually do not need to be in writing. However, there are two important exceptions. First, agency agreements need to be in writing whenever an agreement is reached for an agent to enter into a contract that under the statute of frauds must be in writing. For example, Janet wants Phil to act as her agent. She grants him the power to enter into contracts. The statute of frauds, or more specifically, the equal dignities rule, mandates that the type of contracts Phil is allowed to enter into must be in writing. Therefore, Phil’s agreement with Janet must also be in writing. Also, whenever an agent is given power of attorney (discussed later), the agreement must be in writing. Third, agents may perform their services gratuitously. A gratuitous agent is one who acts without consideration; that is, the agent is not paid for their services. Gratuitous agents function much like regular agents, with a few specific exceptions noted later in this chapter. Agency By Implied Authority In some cases, an agency relationship is not created by an expressed agreement but, rather, is implied by the conduct of the parties. The circumstances of a situation determine the extent of an agent’s ability to conduct business on behalf of the principal. However, the implied authority cannot conflict with any express authority. Page 468 GLOBAL Context Digital Archive Japan/Alamy Formation of Power of Attorney in Luxembourg In the United States and other common-law jurisdictions, a power of attorney authorizes the agent only to “conduct a series of transactions” under instruction from the principal. This limitation makes the power of attorney in common law distinctly different from that provided by civil law, which authorizes the agent to do “everything and anything which the principal himself could do.” Under the law of the Grand Duchy of Luxembourg, the person for whom the power of attorney is acting on behalf is called a donor instead of a principal. Under this Luxembourg law, there are two types of power of attorney from which a donor must choose. The first type is a power of attorney that is valid until death, and the second type is a power of attorney that has unlimited validity, even after death. The actions that are permitted to be performed by a power of attorney are completely

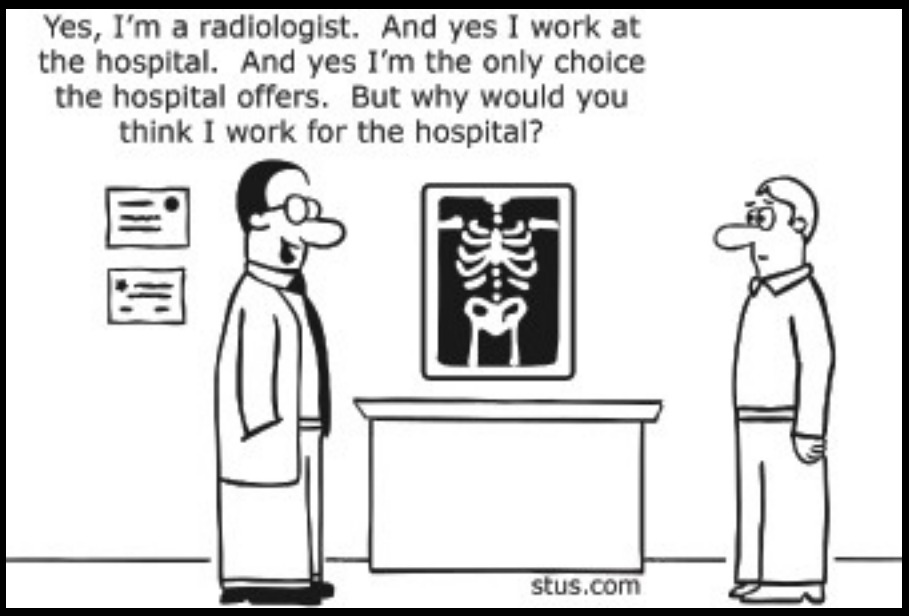
determined by the law in Luxembourg. The law in Luxembourg also requires the power of attorney to be authenticated by a public authority or a public notary by providing a certified identification card or passport as well as proof of residency. Apparent Agency (Agency By Estoppel) Suppose a principal leads a third party to believe that another individual serves as his or her agent but the principal has made no agreement with the so-called agent. Does an agency relationship exist? Yes, because by their conduct, the principal has created apparent agency, or agency by estoppel. According to the principal's conduct, the agent has apparent authority to act; thus, the principal is estopped, or prevented, from denying that the individual is an agent.5 When a third party relies on the principal's conduct and makes an agreement with an apparent agent, the principal must uphold any agreements made by the agent. If the principal attempts to deny an agency relationship existed, the third party must demonstrate that they reasonably believed, on the basis of the principal's conduct, that an agency relationship existed. The court will consider the principal's conduct in determining whether an agency relationship existed. Used by permission of Stu Rees, Stu's Views. Page 469 Suppose an executive of Emporium Carpet is interviewing a potential salesperson named Jose. In the course of the interview, the employer introduces Jose to some clients who are in the building. During the conversation, he says, "I cannot wait to have Jose in our firm. The sooner he works for us, the happier I will be." For some reason, Jose is not hired. But Jose happens to meet these clients later, and in the course of their conversations, the clients place an order with Jose, believing him to be an employee of Emporium Carpet. Emporium now has an obligation to fulfill the order because the third party reasonably believed Jose was an agent of Emporium. In Case 20-1 below, pay close attention to how the court determines whether the party had apparent authority in this agency issue. CASE 20-1 Ackerman v. Sobol Family Partnership, LLP Supreme Court of Connecticut 298 Conn. 495 (2010) FACTS: During a two-day period in June 2008, Coe expressly assured the defendants' attorneys on separate occasions, in response to direct questioning on the issue, that the settlement offer proposed by him at that time was fully authorized by his clients as well as the additional plaintiff's attorney, and that if accepted by the defendants, it would resolve the litigation. The final settlement demand by the plaintiffs' counsel to the Bank of America was the sum of $1.1 million. The Bank of America accepted the $1.1 million settlement proposal on July 1, 2008, prior to the 5 p.m. deadline. At this time, the global settlement offer had been accepted by all defendants. At no time prior to the acceptance of the settlement proposal were the defendants or their attorneys notified that the

offer had been withdrawn, unauthorized, or otherwise ineffective. After the proposal had been accepted by the defendants, the plaintiffs sued the defendants, claiming that the plaintiffs' lead attorney, Glenn Coe, lacked the authority to make several settlement proposals or bind them to a global settlement agreement with Bank of America and the other defendants. The defendants filed motions to enforce the settlement agreement, and the superior court granted the defendants' motions and rendered judgments for defendants. The plaintiffs appealed. ISSUE: Did Coe have the apparent authority to settle with Bank of America on behalf of the plaintiffs? REASONING: To determine whether Coe had apparent authority, the court used the two-part test developed in Tomlinson v. Board of Education. This test holds that apparent authority exists if (1) a principal has held out an agent as possessing the authority to undertake the act in question and therefore (2) the person dealing with the agent acting in good faith reasonably believed that the agent had the necessary authority. The court found that Coe had accompanied the plaintiffs to mediation proceedings long before the settlement was reached and that settlement discussions took place during these mediations. It was clear that these settlement discussions took place with the obvious assent of the plaintiffs. Thus, Coe was certainly held out as having the authority to negotiate a settlement on behalf of the plaintiffs. Given these numerous negotiations involving the defendants, the plaintiffs, and Coe, it was reasonable for the defendants to believe that Coe had the authority to settle on behalf of the plaintiffs. DECISION: Affirmed. SIGNIFICANCE: When one party makes another party their agent, that agent has the authority to make binding agreements for the principal unless that power is clearly denied by the principal. This case serves as a cautionary example that an agent can deals a principal does not agree with even if the agent is acting in good faith. CRITICAL THINKING Is any important information missing from this decision that might further clarify the nature of the issue of agency between the concerned parties? Could it change the acceptability of the judge's reasoning? ETHICAL DECISION MAKING Does this ruling appear to follow a coherent ethical guideline? If so, what form does it take? Who are the stakeholders in this situation? Are they awarded proper consideration under the selected ethical guideline? Page 470 Agency by Ratification Suppose Fred is driving home and sees a car with a For Sale sign in the window. He stops to look at the car because his friend wants to buy a used car. He's amazed at the price and quality of the car, so he tells the owner his friend wants to buy the car. The owner claims that another individual is coming who probably will buy the car in an hour. So, to ensure that his friend gets this car, Fred signs a contract to purchase the car, but he

notes on the contract that he is an agent of his friend. Because he is not an agent for his friend, the friend is not required to uphold the contract. However, if Fred’s friend agrees to purchase the car, the friend has accepted him as the agent for the contract. Fred’s friend is now bound by the contract, and Fred cannot be held liable for misrepresenting himself as the agent. This type of agency relationship is agency by ratification. As suggested in the preceding example, there are two requirements for agency by ratification: An individual must misrepresent themself as an agent for another party. The principal accepts or ratifies the unauthorized act. For ratification to be effective, two additional requirements must be met: The principal must have complete knowledge of all material facts regarding the contract. The principal must ratify the entirety of the agent’s act. (The principal cannot accept certain parts and reject other parts of the agent’s act.) The following case explores the standards courts use to determine the extent of control an employer has over an employee. CASE 20-2 SHANAHAN v. NAT’L AUTO PROT. CORP. 2020 U.S. Dist. LEXIS 101031 (N.D. Ill. June 9, 2020) FACTS: In 2019, Catherine Shanahan received an unsolicited phone call. When she answered, she heard a prerecorded voice message advertising extended automobile warranties (Service Plans). Shanahan stayed on the line and was connected to an agent who reiterated that “he was selling vehicle service contracts for extended auto warranties.” Shanahan decided to purchase a Service Plan. Shanahan learned that National Auto had been the company that called and sold her the Service Plan. But when her Service Plan contract and brochure arrived, Shanahan realized that although National Auto sold her the Plan, a company named “Matrix” administered the Plan. Shanahan also noticed that the Service Plan directed her to contact Matrix Warranty Solutions to obtain service but then listed Nation Motor as the administrator for all 24-hour roadside assistance. The Matrix Defendants and Nation Motor moved to dismiss over lack of personal jurisdiction, but Shanahan argues that the court can exercise personal jurisdiction over them because National Auto acted as their agent when it called her. ISSUE: Do National Auto and Matrix have an agency relationship, and does this relationship confer personal jurisdiction on Matrix? REASONING: A plaintiff may establish actual authority when “at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal’s manifestations to the agent, that the principal wishes the agent to so act.” Apparent authority, on the other hand, may vest when “a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal’s manifestations.” Turning to Matrix Warranty, the Matrix Defendants argue that the contract between the Matrix Defendants and

National Auto insufficiently establishes that the Matrix Defendants possess significant control and authority over National Auto . . . Although the contractual agreement grants Matrix Warranty some control over National Auto, it does not provide sufficient control to confer agency under an actual authority theory. For example, while the agreement prohibits National Auto from modifying terms of the Service Plans, these restrictions come as no surprise given that National Auto sells a product offered by Matrix Warranty (i.e., an extended warranty), which may require Matrix Warranty to perform certain future services. The mere fact that Matrix Warranty prohibits National Auto from changing its product does not make National Auto its agent ... Plaintiff claims that the Matrix Defendants and Nation Motor manifested apparent authority through her Service Plan contract and brochure which "included their names and made them parties to the Service Plan." This Court remains unpersuaded that Plaintiff plausibly alleges that merely receiving a Service Plan from Matrix Warranty would cause a reasonable third-party to believe that the seller must have been their agent. First, Plaintiff does not identify any statements made by the Matrix Defendants or Nation Motor in her Service Plan materials—or at any other time—representing that they made National Auto their agent. This failure defeats her theory based upon apparent authority. Second, reasonable third parties frequently encounter scenarios where one party sells or markets the goods or services of another company without being an agent of that company. For example, when a television station runs an advertisement for Cheerios, reasonable consumers do not automatically understand the television station to be acting as Cheerios' agent. Despite multiple amendments to the complaint and the availability of discovery on the relevant issues, Plaintiff fails to plausibly allege vicarious liability to create personal jurisdiction through a theory of apparent authority. DECISION AND REMEDY: Defendant's motion to dismiss GRANTED. SIGNIFICANCE OF THE CASE: This case shows how a court evaluates the level of control one party had over another and whether an agency relationship exists. CRITICAL THINKING What facts, had they existed in the record, would have changed the direction of this decision? ETHICAL DECISION MAKING Could this court decision be explained as an application of the Golden Rule? Page 471 Recent Developments in Agent/Employer Law The laws that determine the status between an agent and an employer are constantly changing at both the state and federal level. In terms of federal law, one of the most significant potential developments comes in the form of proposed changes to the Fair Labor Standards Act. The new rules intend to increase the minimum salary required for overtime exemption for administrative and professional employees, effectively

increasing the number of employees eligible for overtime compensation nationwide. Another federal-level development involves instituting stricter measures on the classification of employees. With the rise of the “gig economy” (an economy where short-term contracts and freelance work prevail) and high-profile lawsuits against companies such as Uber and Amazon, the divisions between employees, independent contractors, temporary workers, and owner–operators have become increasingly blurry. Thus, the Department of Labor, National Labor Relations Board, and Equal Employment Opportunity Commission have each developed joint employer doctrines for companies that rely on third-party contractors that no longer safeguard these businesses from employment-related liability issues arising from third-party contractors.


Yes, I’m a radiologist. And yes I work at the hospital. And yes I’m the only choice the hospital offers. But why would you think I work for the hospital?
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Agency Relationships LO 20-3 Identify the different types of agency relationships. There are generally three types of business relationships to which agency laws are relevant: the principal–agent relationship, the employer–employee relationship, and the employer–independent contractor relationship. We discuss all three in the following sections and summarize them in Exhibit 20-2. Page 472 Exhibit 20-2Types of Business Relationships and Their Significance for Agency RELATIONSHIP HOW TO IDENTIFY

SIGNIFICANT FOR WHAT ISSUES? Principal–agent Parties have agreed that agent will have power to bind principal in contract. Contract law Employer–employee Employer has right to control conduct of employees. Tort law, tax law, wage law, discrimination law, copyright law Employer–contractor Employer has no control over details of conduct of independent contractor. Tort law, tax law, wage law, discrimination law, copyright law Principal–Agent Relationship The principal–agent relationship typically exists when an employer hires an employee to enter into contracts on behalf of the employer. This relationship is the most basic type of agency relationship. For example, suppose a salesclerk at Abercrombie & Fitch sells Amanda a shirt. The clerk is acting on behalf of the owner; consequently, any sales the salesclerk makes are binding on the owner of Abercrombie & Fitch. Similarly, think of all the advertisements seen on television in which a professional athlete speaks on behalf of a product. The athlete usually hires an agent to find and make agreements on behalf of the athlete to promote products. Employer–Employee Relationship Whenever an employer hires an employee to perform some sort of physical service, the parties have created an employer–employee relationship. The employee is subject to the control of the employer.6 Generally, all employees are considered agents of the employer. Even employees not legally authorized to enter into contracts binding their employer or to interact with third parties are considered agents. Although all employees are agents, the reverse is not true. That is, not all agents are employees. Employer–Independent Contractor Relationship Employers often hire independent contractors, persons who are not employees, to conduct certain tasks. The Restatement of Agency defines an independent contractor as “a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other’s right to control with respect to their physical conduct in the performance of the undertaking.”7 For example, building contractors, doctors, stockbrokers, and lawyers are independent contractors. Furthermore, building contractors, doctors, stockbrokers, and lawyers are agents but not employees. However, not all independent contractors are agents. Independent contractors cannot enter into contracts on behalf of the principal unless authorized to do so by the principal. Employee or Independent Contractor? The question of whether a worker is an employee or an independent contractor has important implications in terms of workers’ compensation, workplace safety, and unemployment statutes. The employer–employee relationship is subject to the workers’ compensation, workplace safety, employment discrimination, and unemployment statutes, whereas the employer–independent contractor relationship is not.

Furthermore, as discussed later in this chapter, employers are generally liable in tort for the actions of their employees, whereas they are generally not liable for the actions of independent contractors. BUT WHAT IF. . . WHAT IF THE FACTS OF THE CASE OPENER WERE DIFFERENT? Let’s say in the Case Opener that a single-route driver named Rick was an independent contractor for FedEx. He delivered a package to a woman named Sarah, but Sarah’s package had been damaged at a FedEx center. Rick formed a contract for Sarah, telling her that FedEx would award her the cost of the item that was shipped. Is Rick legally correct in this scenario? Why or why not? GLOBAL Context Digital Archive Japan/Alamy Stock Photo Independent Contractors in China Due to China’s communist ideology, the country has a heavy emphasis on workers and their rights. Thus, independent contractors are almost nonexistent in China, and obtaining independent contractor status is much harder (but possible). Per the “Decision on Revising the Labor Contract Law of the People’s Republic of China,” employers in China are usually required to sign an employment contract with a new employee no later than a month into their employment. Thus, Chinese employers may only use paiqian or “dispatched” employees when the nature of the work they will carry out is temporary, auxiliary, or backup. The most common scenario where an employee’s work is temporary is when one company leases its employees to another for a particular project. Those employees are still considered employees of their host company, but they sometimes work without a formal contract for the company leasing them. Just as in the U.S., some companies try to skirt the employee classification rules and have workers serve as “independent contractors” under the table to avoid having to pay benefits or other costs. And just as in the U.S., this practice comes with legal consequences if the Chinese government finds out. Page 473 When courts are deciding whether a worker is an employee or an independent contractor, perhaps the most important issue they consider is how much control the employer exerts over the agent.8 If the employer has substantial control over day-to-day operations of the worker, the worker is generally considered an employee. Case 20-3 examines the criteria that determine whether a worker is an employee or an independent contractor. CASE 20-3 DOE v. UBER TECHNOLOGIES, INC. United States District Court for the Northern District of California 184 F. Supp. 3D 774 (2016) FACTS: This tort suit was brought by Jane Doe 1 and Jane Doe 2 against Uber Technologies, Inc. stemming from separate alleged sexual assault incidents. In February 2015, in Boston, Massachusetts, Doe 1 and her friends used the Uber app to get a ride after they had gone to a party. An Uber driver named Abderrahim Dakiri picked up Doe 1 and her party. Dakiri dropped off Doe 1’s friends first. With Doe 1 the

sole remaining customer in the Uber, Dakiri subsequently began to sexually assault her, taking a circuitous route “in order to increase his opportunity to sexually assault her,” and parking the car in a remote area. In August 2015, in Charleston, South Carolina, Doe 2 and her friends arranged a ride using Uber’s app. Uber driver Patrick Aiello drove Doe 2 and her group to a bar and someone in the group asked Aiello if he would agree to pick them up later. Aiello eventually drove Doe 2 and her friends to one of the group’s apartment. While still in the Uber driver’s car, Doe 2 mentioned she could not find her phone and wanted to search for it in the apartment. Doe 2 searched for the phone and then left, intending to walk back to her own apartment. When Doe 2 went outside, Aiello was waiting and offered to drive her home. Doe accepted under the assumption that Aiello was still acting as an Uber driver. Aiello subsequently raped Doe 2. The plaintiffs brought suit against Uber under six claims for relief, four of which rely on a theory of respondeat superior. Uber moved to dismiss the complaint for failure to state a claim. ISSUE: Are Uber’s drivers employees, and if so, did the sexual assault occur within the drivers’ scopes of employment? REASONING: The plaintiffs in this case brought their argument under the doctrine of respondeat superior, which holds that an employer can be liable for the illegal actions of its employees. However, this doctrine only applies to employer–employee relationships and not to independent contractors. The plaintiffs alleged that Uber controls many aspects of a driver’s job, such as setting fare prices without driver input, retaining control over customer information, the fact that Uber can terminate drivers at will, and that there are no specialized skills needed to drive for Uber. In addition, the court found that Uber controls the manner and means by which drivers offer rides through the Uber app and that drivers must accept all ride requests when logged into the app. Considering the amount of control Uber has over its drivers and recent precedent with similar conclusions, the court ruled that Uber’s drivers were indeed employees. Next came the question of whether the assaults were committed within the scope of employment, which is a necessary condition for respondeat superior. Uber pointed out that in Doe 2’s case, the assault happened after the original ride had ended. The court pointed out, however, that Doe 2 would not have been in the position to take the second ride had she not hired the first one. In addition, sexual assault is, unfortunately, an action that Uber could reasonably foresee one of its employees taking, which is exactly why traditional taxi companies perform background checks on their drivers. Because of Uber’s control over its employees and its unique position to help prevent these incidents from occurring, the court argued that a question of fact as to whether the drivers

were acting within the scope of their employment existed. DECISION: Uber’s motion to dismiss was denied and the case was allowed to proceed. SIGNIFICANCE: This case provides a good illustration of how a court might determine whether a worker is an employee or independent contractor as well as whether an employer may be liable under respondeat superior. CRITICAL THINKING What could Uber have done to assure that their drivers are considered independent contractors? ETHICAL DECISION MAKING What values are being treated as relatively unimportant when Uber establishes its work environment for drivers? Page 474 Although the degree of control an employer maintains is the central factor courts look at in determining whether a person is an employee or an independent contractor, it is by no means the only factor examined. Exhibit 20-3 lists the additional criteria the court considers in deciding whether a worker is an employee or an independent contractor. These criteria were established in the Restatement of Agency.9 Exhibit 20-3Independent Contractor or Employee? CRITERIA EMPLOYEE INDEPENDENT CONTRACTOR Does the worker engage in a distinct occupation or an independently established business? No Yes Is the work done under the employer’s supervision, or does a specialist without supervision complete the work? Employer supervision Specialist without supervision Does the employer supply the tools? Yes No What skill is required for the occupation? No specialized skill Great degree of skill What is the length of time for which the worker is employed? Long time Varies Is the worker a regular part of the business of the employer? Yes No How is the worker paid? Regular payments according to time When the job is completed GLOBAL Context Doug Armand/Getty Images Special Types of Agency in the Middle East and Africa The legal concept of agency has been around for centuries, but it was actually heavily influenced by an even older system known as hawala that is still highly utilized in the Muslim world. Hawala is essentially a way of transferring money from one party to the other through the use of hawaladars, or middlemen agents. For example, if a buyer wishes to purchase real estate from a seller in a different city, the buyer would first give the money to hawaladar X along with a special password. Hawa X would then call hawa Y in the seller’s city and tell him the amount to be paid along with the password. The seller, who has been told the password, then approaches hawaladar Y, who pays the seller the stipulated amount, minus a small commission. Hawaladar X now owes hawaladar Y that amount of money, and the two hawaladars will settle their debt at a later date. The settlement of debt can take many forms (such as goods or services) and need not be paid out in cash. Hawala is unique in that it involves no written contracts and relies entirely on an honor system between hawaladars to

ensure debts are paid. Because there is no paper trail, the transaction goes untaxed by local governments and thus the practice has been made illegal in many of the countries where it is practiced. Despite the ban, it remains highly popular because many residents of these countries see it as a cheaper and more reliable alternative to exchanging money through banks. In fact, in developing parts of the world without a steady financial infrastructure, hawala is often the only option for secure fund transfers.

Duties of the Agent and the Principal LO 20-4 Describe the duties of the agent. An agency relationship is a fiduciary relationship of trust, confidence, and good faith. Thus, the formation of an agency relationship results in the creation of certain duties that the principal and agent owe each other. These duties are established in the agency agreement and are implied by the law. We discuss them in the following sections and present a summary in Exhibit 20-4. Exhibit 20-4Summary of Duties in an Agency Relationship PRINCIPAL TO AGENT AGENT TO PRINCIPAL Duty of compensation Duty of loyalty Duty of reimbursement and indemnification Duty of performance Duty of cooperation Duty of notification Duty to provide safe working conditions Duty of obedience Duty of accounting Principal’s Duties to the Agent LO 20-5 Describe the duties of the principal. Page 475 When a principal contractually agrees that another person can make agreements on their behalf, the principal owes certain duties to the agent. If these duties are not fulfilled, the principal has violated the agent’s rights. Consequently, the agent can bring a suit against the principal. If the agent is successful in bringing a suit against the principal, the agent is entitled to contract or tort remedies. Furthermore, if the principal has failed to meet duties owed to the agent, the agent can refuse to act on behalf of the principal until the failure is remedied. Page 476 Duty of Compensation The principal has a duty to compensate the agent for services provided unless the parties have agreed that the agent will act gratuitously. The agency contract usually specifies the type and amount of compensation as well as the time at which the compensation will be given to the agent. Thus, if a person hires an attorney to represent them, they have a duty to pay that attorney, their agent. If there is no agreement on the amount the principal will compensate the agent, the courts suggest that compensation should be calculated according to the customary fee in the situation.10 Duty of Reimbursement and Indemnification The principal has a duty of reimbursement and indemnification to the agent. If an agent makes authorized expenditures in the course of working on behalf of the principal, the principal has a duty to reimburse the agent for the amount of money

spent.11 Thus, if an agent takes a trip on behalf of the principal, the principal must have authorized this trip if the agent is to be reimbursed by the principal. Similarly, the principal has the duty to indemnify or reimburse the agent for any losses the agent incurs while working within the scope of authority on the principal's behalf.12 For example, suppose an agent makes an agreement with a third party on behalf of the principal and the principal fails to uphold the agreement. The third party could sue the agent for damages because of the failure to uphold the agreement. The principal has a duty to indemnify the agent for the losses the third party sustained. CASE Nugget Duty to Compensate Ralph T. Leonard et al. v. Jerry D. McMorris et al. 320 F.3d 1116 (2003) NationsWay was one of the largest privately held trucking companies in the United States, with 3,200 employees operating in 43 states. In 1999, NationsWay filed for Chapter 11 bankruptcy and terminated most of its employees. Ralph Leonard and a number of the other employees who were terminated sued Jerry McMorris and other NationsWay executives, arguing they were personally liable for unpaid wages under their duty to compensate arising from the employer–employee relationship. The defendants argued they could not be held personally liable for agreements made between the employees and the corporation. As the case began, NationsWay was continuing its bankruptcy filings, under which the former employees were to receive approximately $3 million in unpaid wages. However, the plaintiffs wanted additional amounts covering accrued vacation pay, sick-leave pay, holiday pay, and other nonwage compensation, as well as a 50 percent penalty and attorney fees. In deciding the case, the court addressed "[w]hether officers of a corporation are individually liable for the wages of the corporation's former employees under the Colorado Wage Claim Act." The court concluded, "[U]nder Colorado's Wage Claim Act, the officers and agents of a corporation are not jointly and severally liable for payment of employee wages and other compensation the corporation owes to its employees under the employment contract and the Colorado Wage Claim Act." Although the corporation has a duty to compensate, the executives who were the defendants were not individually liable to the former employees for the unpaid wages. Page 477 Duty of Cooperation The principal also owes a duty of cooperation to the agent. Therefore, the principal must assist the agent in the performance of their duties. Furthermore, the principal can do nothing to interfere with the reasonable conduct of an agent. For example, suppose Suzy hired someone to sell her car for her. Suzy must be willing to let the agent show her car to interested buyers. Duty to Provide Safe Working Conditions The principal has a duty to provide safe working conditions for the agent. This includes equipment,

premises, and other working conditions. If the principal is aware of unsafe working conditions, the principal has a duty to warn the agent of the potential danger and make the necessary repairs. Federal and state statutes, such as the Occupational Safety and Health Act (OSHA), set specific standards for the working environment. If an employer violates these standards, the employer may be subject to fines. Agent’s Duties to the Principal When an agent agrees to act on behalf of a principal, the agent is a fiduciary, a person in a position of trust and confidence and, as such, owes certain duties to the principal. However, because the agent makes agreements on behalf of the principal, the agent is in a position to harm the principal. If, for example, an agent makes numerous contracts the principal could not possibly carry out all at once, it is likely the third parties would sue the principal for not carrying out the agreements. If the agent breaches their fiduciary duties, the principal can sue the agent, and the principal may be entitled to a variety of contract and tort remedies beyond those stated in the contract. Duty of Loyalty Courts suggest that the duty of loyalty is perhaps the most important duty an agent owes to a principal. Because the agency relationship is a fiduciary relationship (i.e., a relationship of trust), the agent has a responsibility to act in the interest of the principal.13 The agent carries out her duty of loyalty to the principal in a number of ways, including avoiding conflicts of interest and protecting the principal’s confidentiality. An agent can, in most situations, represent and act on behalf of only one principal in an agreement. An agent usually cannot represent both the principal and a third party (who would then become another principal if represented by the same agent) in an agreement because there could be a conflict of interest. In addition, the agent has a duty to notify the principal of any offers from third parties. For example, suppose Tony has hired a real estate agent to make land purchases for him. A third party notifies the real estate agent that some of their property will soon be going up for sale, and the third party wants to know whether Tony, the principal, would be interested in buying the property. The real estate agent cannot decide to buy that property for themself until (1) the agent has communicated the offer to Tony and (2) Tony has considered and rejected the offer. The duty of loyalty also requires the agent to keep confidential any information about the principal during the course of agency and after the agency relationship is terminated. The agent cannot disclose or misuse any information received during or after the agency relationship with the principal. Duty of Notification Not only does the agent have to communicate offers from third parties, but the agent must also communicate any information the agent thinks could be important to the principal. This duty is known as the duty of notification.14

For example, if a third party has made an agreement through an agent with a principal and the third party has failed to meet the agreement, the agent must notify the principal of this information in a timely manner. It is critical for an agent to inform the principal of all relevant information because the law typically assumes the principal is aware of all information revealed to the agent, regardless of whether the agent shares all this information with the principal. Duty of Performance The agent owes a duty of performance to the principal. This duty is twofold. First, the agent must perform the duties as specified in the agency agreement. For example, suppose an insurance agent contacts Bethany about purchasing a car insurance policy. Bethany agrees to purchase the policy, but for some reason the agent never obtains the policy for her. Bethany discovers the insurance agent's mistake when she gets into a car accident. The insurance agent did not meet the duty of performance. Consequently, Bethany could bring a claim against the insurance agent. Page 478 Second, the agent must perform the specified duties with reasonable skill and care. The agent is expected to provide the same standards of skill, care, and professionalism that a reasonable person in the same situation would provide. For example, when an attorney advertises that they are a specialist in a certain type of law, this lawyer will be held to the reasonable standard of care in that specialty of law.15 A gratuitous agent cannot be found liable for a breach of contract for failure to perform because no contract exists between the principal and the agent. However, if a gratuitous agent begins to act as a regular agent, and the principal affirms the relationship, a duty to perform arises insofar as the agent has begun a specific task for the principal. Duty of Obedience Under the duty of obedience, the agent must follow the lawful instruction and direction of the principal.16 Thus, if the agent makes an unauthorized agreement, the agent has failed to meet the duty of obedience. However, if the principal gives unlawful or unethical instructions, the agent is not required to behave in accordance with those instructions. For example, let's say a principal tells an agent to sell a basketball autographed by Michael Jordan; however, the agent knows that the principal forged the signature on the basketball. The agent is not required to obey the instructions of the principal. Duty of Accounting Under the duty of accounting, the agent must keep an accurate account of the transactions of money and property made on behalf of the principal.17 If the principal requests to see this accounting, the agent has a duty to provide the principal with the accounting. Part of the duty of accounting is the duty of the agent to keep separate accounts for the principal's funds and the agent's funds. The agent cannot allow the funds to mix.

Rights and Remedies Principal’s Rights and Remedies against the Agent Because the agency relationship generally is a contractual relationship, a principal has contract remedies available for breach of fiduciary duties. In addition, a principal may use tort remedies for an agent’s misrepresentations, negligence, or other business failings that cause damage to the principal. Furthermore, when an agent breaches their fiduciary duties, the principal has the right to terminate the agency relationship. Although numerous possible remedies are available to the principal, the three main remedies are constructive trust, avoidance, and indemnification. Constructive Trust Agency relationships exist primarily for the benefit of the principal. Therefore, principals are the legal owners of anything an agent may come to possess through the employment or agency relationship. Accordingly, when an agent through deceit or other means retains profits or goods obtained through the employment or agency relationship, which by law belong to the principal, the agent has breached their fiduciary duties. For example, Joy is an agent of Sarah’s, selling real estate. Joy sells a piece of property for $2,000 more than Sarah anticipated. Joy then keeps the extra $2,000 and reports the sale at the price Sarah expected. By law, the profits belong to Sarah, and Joy has breached her fiduciary duties by keeping the money. Also, an agent may not use the agency relationship to obtain goods or property for themself when the principal desired to obtain the same goods or property. In an agency relationship, the principal always has right of first refusal. That is, before an agent may use the relationship for a personal acquisition, the principal has the opportunity to buy whatever goods or properties are in question. Returning to Sarah and Joy, if Joy were to buy a piece of land she knew Sarah wanted to purchase, she again would have breached her fiduciary duties to Sarah. Page 479 When an agent illegally benefits from the agency relationship, the principal may enact a constructive trust on the profits, goods, or property in question. A constructive trust is an equitable trust imposed on a person who wrongfully obtains or holds legal right to property they should not possess. When a principal enacts a constructive trust, the court rules that the agent is merely holding the property or goods in trust for the principal, granting the principal legal right or possession. Avoidance When an agency relationship exists through a contract and the agent breaches the agreement or fiduciary duties, the principal may use their right of avoidance. Avoidance allows a principal to nullify any contract the agent negotiated. Which, if any, contracts are voided is at the discretion of the principal. Indemnification Agents enter into

contracts with third parties on behalf of the principal. If a third party believes that the agent is acting with actual or apparent authority, they may sue the principal for any breach of contract. However, when the breach was caused by the agent's negligence, the principal has a right to indemnification. That is, when sued by a third party, a principal may sue the agent to recover the amount assessed to the third party if the breach of contract is the agent's fault. In addition to recovering for negligence, a principal can recover if an agent fails to follow the principal's instructions. Courts have had difficulty in determining when a principal gives limiting instructions and when they merely give advice. Going against advice does not impose liability on an agent, but violating limiting instructions does. For a principal to avoid a potential lawsuit from a third party, they should notify the third party whenever a relationship with an agent ceases or limiting instructions are given. Agent's Rights and Remedies against the Principal Although agency relationships are intended to benefit the principal, the agent is not without rights and remedies. Whenever a duty is imposed on the principal, a corresponding right exists for the agent. Agents have available tort and contract remedies in addition to the right to demand an accounting. Tort and Contract Remedies Agents, much like principals, have certain tort and contract remedies available for situations in which a principal violates an agency agreement. These remedies are the same as standard tort and contract remedies. Demand for an Accounting When an agent feels they are not being properly compensated, especially when working on commission, the agent may demand an accounting. When an agent demands an accounting, they may withhold further performance of their duties until the principal supplies appropriate accounting data. For example, Hal is a used-car salesman working for Not a Lemon Car Dealers. When Hal receives his pay, he believes he has been shorted the appropriate amount he made on commission. Hal can request Not a Lemon to obtain an auditor to perform an audit and determine whether he was in fact paid the proper amount for his sales. BUT WHAT IF. . . WHAT IF THE FACTS OF THE CASE OPENER WERE DIFFERENT? Let's say in the Case Opener that Janelle, a truck driver, was an independent contractor for FedEx. She looked at her income over the course of the prior year and was quite certain that she was not being paid her promised compensation. She demanded that FedEx hire an auditor to go over the company's records and make sure she and other independent contractors in her area had been paid fairly. Does FedEx have a duty to Janelle to do this? Specific Performance When a contract exists and a principal agrees to certain conditions but fails to perform, under contract remedies the agent may seek court assistance in forcing the principal to

perform the contract as stipulated. However, when the agency relationship is not contractual or the contract is for personal services, an agent does not have the right to seek specific performance. In noncontractual relationships, an agent may recover for services rendered and/or future damages, but the agent may not force the principal to fulfill the specific contractual agreements or even to continue to employ the agent.

Authority of the Agent: The Link to the Principal's Liability LO 20-6 Identify the different types of authority of the agent. Earlier in the chapter, we discussed how an agency relationship and its resulting authority could be created. That section introduced the important concepts of (1) express agency, or agency by agreement; (2) implied agency; and (3) apparent agency, or agency by estoppel. Each of these avenues for creating agency includes a form of authority that attaches to that type of agency. Express Authority In an express agency relationship, the agent has express authority, which is often referred to as actual authority. The principal has explicitly instructed the agent to do something. Therefore, if the principal requests their agent to sell their house for $100,000, the agent has explicit authority to sell the house for that amount. Express authority is binding in the sense that it gives the agent the power to make transactions and agreements with third parties. Because an agent with express authority has specific goals they are to achieve, the agent is also granted the use of other means, beyond the expressed agreement, reasonably necessary to achieve the desired goal.18 When express authority is granted for an agent to enter into a contract legally required to be in writing, most states require the grant of authority also to be in writing. This requirement is known as the equal dignity rule. When an agency agreement fails to adhere to the equal dignity rule, the subsequent contracts are typically considered voidable by the principal. This rule is based on the statute of frauds. There are two key exceptions to the equal dignity rule. The first pertains to executive officers. When an executive officer is conducting business in the usual course of her job, she need not obtain written approval from the corporation for every decision she makes. The second exception is rooted in common sense. The equal dignity rule does not apply to an agent when the agent is working in the direct presence of the principal. Implied Authority In an implied agency relationship, the agent has implied authority; that is, the relationship is inferred from the conduct of the parties. Consequently, the authority of the agent is implied on the basis of words and actions of the principal to the agent.19 An agent's implied authority is derived from an agent's express authority and consists of

what is reasonably necessary for carrying out the agent’s grant of express authority. One way an agent may have implied authority is through custom. Therefore, it is important for third parties to familiarize themselves with the trade. Furthermore, if an agent must make an agreement or transaction to carry out the transaction they have agreed to perform for the principal, we can generally infer the presence of the authority. For example, suppose one agrees to serve as a manager for a store. The contract probably does not expressly give authority for every decision the manager might need to make. However, the manager has implied authority to make agreements and transactions that customarily go along with the manager’s position. Another example of implied authority revolves around anyone, such as a purchasing agent, who ordinarily is the person who everyone in the industry expects will make contracts for particular inputs. For someone to act as if the purchasing agent lacks authority to make such commitments on behalf of the firm would be to act contrary to the expected lines of authority. Page 481 Apparent Authority and Estoppel As you learned earlier in this chapter, apparent agency exists when a third party reasonably believes, on the basis of a principal’s actions, that an agency relationship exists between the principal and another individual. Thus, if the third party reasonably believes that the agent has authority to represent the principal, the principal must uphold any agreements made with the agent, who has apparent authority.20 The principal is prevented (estopped) from acting as if the agent had no such authority.

Contractual Liability of the Principal and Agent LO 20-7 Explain the contractual liability between the principal and the agent. In addition to identifying the type of authority an agent has, courts must identify a few other factors when making decisions about an agency relationship’s liability to third parties. First, the court must determine the classification of the principal. Second, the court must decide whether the principal authorized the actions of the agent. Classification of the Principal Classifications are made from the perspective of the third party. In other words, the extent of the third party’s knowledge about the principal determines the classification of the principal. What are potential ethical issues arising from questions about the authority of a particular agent? The law of agency places special weight on the viewpoint of the agency relationship from the perspective of the third party (neither the agent nor the principal). But who are the other

stakeholders in a managerial decision who might be affected by the assignment of a particular form of authority? When a principal is classified as a disclosed principal, the third party is aware that the agent is making an agreement on behalf of a principal; the third party also knows the identity of the principal. In contrast, if a third party is aware that an agent is making an agreement on behalf of a principal but the third party is unaware of the identity of the principal, the principal is classified as a partially disclosed principal or an unidentified principal. Finally, if a third party does not know an agent is acting on behalf of a principal, the principal is classified as an undisclosed principal. Remember, the classification of the principal is important because it is a significant factor in determining the liability of the principal.21 Authorized Acts When an agent acts within the scope of their authority on behalf of a disclosed or partially disclosed principal, the agent is not liable for the acts of the principal.22 The principal is liable only if the agent has some kind of authority to act on the principal's behalf. With a disclosed principal, the agent is not liable because they are not a party to the transaction. Yet, if the principal is partially disclosed, the agent can be held liable herself because the courts generally treat the agent as a party to the contract. As a party to the contract, the agent may be found liable to the third party for contractual nonperformance.23 Whether disclosed or partially disclosed, apart from any liability the agent might have, the principal is liable for the agreements made with the third party. Page 482 When the agent acts within their authority on behalf of an undisclosed principal, the law will likely hold the agent liable for the agreement. Remember, with an undisclosed principal, the third party is not aware of the existence of the principal. Thus, in the eyes of the third party, the agent is the only possible person who could be liable. Yet, if the agent is liable to the third party, then the undisclosed principal is liable to the agent. However, there are certain situations in which the agent is the only party liable for the contract. These situations are The contract expressly excludes the principal from the contract. In that the principal was not a party to the contract, they have has no liability to the agent. The agent enters into a contract that is a negotiable instrument. The Uniform Commercial Code (UCC) governs negotiable instruments and states that another party, that is, a principal, cannot be liable for a negotiable instrument if their name is not on the instrument or if the agent's signature does not indicate that the agreement was made in a representative capacity.24 The third party enters into a contract with the agent that requires the performance of the agent. In this case, the third party may reject the performance of the principal. For example, if the agent is a photographer and they enter into a contract for their principal without disclosing this fact, the

third party may reject the principal’s attempt to fulfill the contract by taking the third party’s picture. If the principal or agent knows a third party would not enter into a contract with the principal if the principal’s identity were disclosed but the agent enters into a contract with the third party anyway, the agent will be the only party liable if the third party rescinds the contract. In situations in which a principal was undisclosed, a judgment for a third party against an agent, when the third party comes to know of the undisclosed principal’s identity, releases the principal from liability.25 Also, a judgment against a previously undisclosed principal frees the agent from liability.26 Exhibit 20-5 summarizes contractual liability to third parties for authorized acts of the agent. Exhibit 20-5Contractual Liability to Third Parties for Authorized Agent Acts CLASSIFICATION OF PRINCIPAL AGENT LIABILITY? PRINCIPAL LIABILITY? Disclosed No Yes Partially disclosed Possibly Yes Undisclosed Yes Yes Unauthorized Acts If an agent has no authority to act on behalf of a principal but the agent still enters into a contract with a third party, the principal, regardless of the classification, is not bound to the contract unless the principal ratifies the agreement. When the agent exceeds their authority to act on behalf of the principal, the agent will likely be personally liable to the third party. Yet, when the third party is aware that the agent does not represent the principal, the law does not hold the agent liable for the agreement. In almost all other cases in which the agent claims to have authority to contract on behalf of the principal, the law holds the agent liable to the third party. If an agent enters into a contract knowingly misrepresenting their alleged authority, the agent is liable to the third party in a tort action. Agents who go beyond their authority when the principal is disclosed or partially disclosed are liable for a breach of implied warranty, not for a breach of contract. The agent cannot be found liable for breach of contract because the agent is never an intended party to the contract, even when exceeding their authority. The agent can breach the implied warranty intentionally, through a knowing misrepresentation, or unintentionally, through a good-faith mistake, such as simply misjudging their authority. In either case, the agent is liable if the third party acted relying on the agent’s alleged status. Exhibit 20-6 summarizes the contractual liability of principals and agents to third parties for unauthorized acts of the agent. Exhibit 20-6Contractual Liability to Third Parties for Unauthorized Acts of the Agent THIRD-PARTY BELIEF AGENT LIABILITY? PRINCIPAL LIABILITY? Believes that the agent has authority Yes No Believes that the agent is mistaken about her authority No No

Tort Liability and the Agency Relationship If an agent commits a tort that injures a third party, the agent is personally liable for their actions, regardless of both the classification of the principal and the liability of the principal.27 The principal may also be held liable for the agent's actions. This liability can arise from authorized or unauthorized acts. Furthermore, tortious liability of the principal can be established directly or indirectly. Finally, if an agent is an employee and the principal/employer controls the employee's behavior, the principal can be found liable. The next section explains these methods of establishing tortious liability. Page 483 Principal's Tortious Conduct The law holds a principal directly responsible for the tortious conduct of their agent under two conditions. First, if the principal directs the agent to commit a tort, the principal is liable for any damages caused by that tort. The principal is authorizing the agent's unlawful behavior; thus, the principal is held responsible.28 Similarly, the principal is liable for an agent's tortious act if the principal, although not condoning the agent's conduct, ratifies the agent's actions knowing the agent acted improperly.29 Second, if the principal fails to provide proper instruments or tools or gives inadequate instructions to the agent concerning the necessity to employ competent agents, the law then holds the principal liable to a third party for negligence. Under this provision of liability, a principal is liable for their negligent hiring of an agent. Thus, a principal must use proper care in selecting an agent for a job. This doctrine of negligent hiring has been used when an agent commits a tort against a customer, who often argues that the principal is liable because they should have taken more care in hiring the agent. Respondeat Superior The doctrine of respondeat superior (a Latin phrase meaning "let the superior speak") is used in the context of the principal/employer–agent/employee relationship. The principal/employer holds vicarious liability (i.e., liability assigned without fault) for any harm caused by the agent/employee during the time the agent/employee is working for the principal. In other words, the principal/employer is liable not because they were personally at fault but because they negligently hired an agent. The rationale behind this doctrine is that employers should be held liable for employees who commit torts because the employer is furthering their business through the work of the employee. If the employer is benefiting by the work of the employee, the employer should also be responsible for the harms caused by the employee. Therefore, when a third party is injured through the negligence of an employee during the course of the employee's work, the third party can sue either the employee or the employer.30 To establish employer liability, the third party must establish that the wrongful act occurred within the scope of employment. The courts

consider the following elements in determining whether an act has occurred within the course and scope of employment:31 Did the employer authorize the employee’s act? Did the act occur within the time and space limits of employment? Was the act performed, at least in part, on behalf of the employer? To what extent were the employer’s interests advanced by the act? To what extent were the private interests of the employee involved? Did the employer provide the means (i.e., tools) by which the act occurred? Did the employee use force the employer did not expect? Did the employer know that the act would involve the commission of a serious crime? Page 484 For example, if an employee is a delivery driver and negligently injures a third party while making deliveries on behalf of the employer, both the employee and the employer will be held liable. Now suppose that the delivery driver is using the company vehicle when he stops at a drive-through at a fast-food restaurant to get some coffee. Could the employer be liable to a third party for an accident involving the delivery driver? If an agent makes a substantial departure from the course of the employer’s business, the employer is not liable. Courts often refer to a substantial departure as a “frolic of his own.” However, if the deviation from the employer’s business is not substantial, the employer can still be held liable. If the third party is able to establish employee negligence such that the employer is liable, the employer has the right to recover from the employee any damages the employer paid to the third party as a result of the employee’s negligence. The right to recover damages is referred to as the right of indemnification. However, if the employee is innocent of negligence, the employer is also free of liability. Intentional Torts and Respondeat Superior The agent is liable for any torts they commit. In the same way that the principal is responsible for the negligent acts of the employee under the doctrine of respondeat superior, the principal may be liable for any intentional torts of the employee. Furthermore, an employer may be responsible for any tortious acts of the employee if the employer knew or should have known that the employee had a tendency to commit a tortious act. Hence, a principal may be liable for negligent hiring if they fail to do a background check to learn about the tendencies of potential employees. For example, the principal of an employee with a criminal background may be held liable for tortious acts committed by this hired agent, even though the employee may not recognize the wrongfulness of their act. Therefore, employers will most likely purchase liability insurance in case particular employees engage in tortious activities. Agent Misrepresentation If an agent misrepresents themself to a third party, the principal may be tortiously liable for the agent’s misrepresentation. Unlike tort liability, which is based on whether the agent/employee was

acting in the scope of employment, misrepresentation liability depends on whether the principal authorized the agent’s act. If the principal authorizes the agent to engage in an act and the agent misrepresents themself intentionally or unintentionally, the principal is always tortiously liable to someone who relied on the agent’s misrepresentation. If an agent has misrepresented herself, the third party has two options: The third party can cancel the contract with the principal and be compensated for any money lost. The third party can affirm the contract and sue the principal to recover damages. Principal’s Liability and the Independent Contractor As we discussed earlier in this chapter, an independent contractor is not an employee of the individual who hires them to do work. The individual doing the hiring does not control the details of the independent contractor’s performance. Consequently, an individual who hires an independent contractor cannot be held liable for the independent contractor’s tortious actions under the doctrine of respondeat superior. Suppose that while working on the outside of the building they are renovating, an independent contractor accidentally injures an innocent bystander when they drop a pile of bricks on the bystander. The owner of the building is not liable for the innocent bystander’s injuries; the independent contractor is liable.32 Page 485 If, however, the independent contractor engages in extremely hazardous activities, such as blasting operations, for the principal, the principal will be responsible for any damages by the independent contractor. Certain activities are held strictly liable because of their inherently dangerous nature. Thus, an employer cannot escape the strict liability associated with those hazardous activities simply by hiring an independent contractor to complete the activities. In addition, the employer cannot escape liability for an independent contractor’s tort if the employer directs the contractor to commit the tort. The following Case Nugget demonstrates the role of tort principles in establishing the liability of those who employ independent contractors to engage in inherently dangerous activities. CASE Nugget Liability When Hiring Independent Contractors Larry S. Lawrence v. Bainbridge Apartments et al. Court of Appeals of Missouri, Western District 957 S.W.2d 400 (1997) In 1989, Smart Way Janitorial offered a bid to Larry Lawrence to wash the windows of Bainbridge Apartments. In May 1989, when Larry went to look at the apartments, he was told that Bainbridge wanted the windows washed from outside the building so that the residents would not be disturbed. The Bainbridge property consisted of six buildings: two seven-story buildings and four four-story buildings. Even though Lawrence could not create a safety line for washing the outside of the windows of the four-story buildings, the building manager insisted that Lawrence wash the windows

from the outside. When Lawrence started washing the windows from the outside, he fell from one of the shorter buildings and suffered injuries. He brought a suit against Bainbridge Apartments, arguing that Bainbridge was negligent based on the inherently-dangerous-activity exception to the doctrine that landowners are not vicariously liable for injuries caused by the negligence of an independent contractor or his employees. The trial court ruled that because Lawrence had recovered workers' compensation benefits, the injury was not covered by the inherently-dangerous-activity exception. The trial court granted summary judgment to Bainbridge; however, when Lawrence appealed, the decision was reversed and remanded because the court of appeals ruled that Lawrence was not a covered employee entitled to workers' compensation benefits. The court argued that in establishing the rule of liability in this case, it would look to which party can best avoid the harm and manage the risk of loss of the inherently dangerous activity in question. An independent contractor who knows he will not be compensated by the landowner for his injuries has a strong incentive to take additional care and avoid neglect in performing his duties. This encourages him to demand additional safety measures and compensation before he agrees to undertake an inherently dangerous activity. The independent contractor is free to bargain and negotiate without restraint with the landowner. An independent contractor holds himself out as an expert who is uniquely qualified and skilled to bid for and perform the acts in question. As an expert, he is in a better position to understand the risks and costs involved in a particular job, and he may demand sufficient remuneration and safety measures to cover what he believes the attendant risks to be. In return for his bargained-for price, he accepts the allocation of the risk. The court held that an injured independent contractor, although uninsured, cannot recover under the inherently-dangerous-activity exception.

Termination of the Agency Relationship There are multiple ways to end an agency relationship. The parties may act to terminate the relationship. Alternatively, some agencies terminate automatically by the lapse of time, fulfillment of purpose, or operation of law. If the agency relationship has ended, the agent no longer has authority to make agreements on behalf of the principal. However, the agent's apparent authority continues until the principal notifies third parties that the agency relationship has ended. What terminates the agency relationship? Notice of the termination of an agency relationship can be given in two general forms: actual or constructive. Actual notice of termination is given when third parties are directly informed, orally

or in writing, that an agency agreement has terminated.33 Actual notice must be given to third parties who have had business interactions with the agent. Also, when the agent's authority was granted in writing, actual notice must be given in writing. Parties not directly related to an agency agreement may receive constructive notice, which is how notice of the termination of an agency agreement is generally announced.34 Constructive notice is most frequently delivered through publication in a generally circulating newspaper for the area where the agency agreement existed. The issue of termination of the agency is especially important for global commerce. When parties are forming a contract of agency in a foreign jurisdiction, it is extremely important for the parties to include the conditions of termination within the contract. Termination of an agency relationship involving persons from separate jurisdictions often results in complicated legal battles over compensation and liability. For example, principals must be aware of local labor laws because these laws can create agents' compensation and pension rights that are unknown to the principal. Local legal counsel should be especially knowledgeable about the provisions surrounding termination of agency in the particular jurisdiction and be able to help managers avoid unnecessary legal battles. For example, if a manager has business transactions in one of the European Union countries and wants to terminate an agency relationship, they would want to have access to knowledge about the intricacies of Chapter IV of the Agency Relationship Law, which focuses on termination. After the termination of an agency contract in the EU countries, the agent receives help from the law in collecting damages. A released agent receives compensation if the agent has brought the principal new customers from whom the principal continues to profit, if the agent is unable otherwise to recover costs incurred through the performance of the contract, or if the agent dies. Under certain circumstances, however, the law in European Union countries prohibits the agent from receiving compensation. For instance, if the principal has terminated the contract due to the incapacity of the agent, the principal is not obligated to dispense compensation. Also, compensation is not payable if the agent terminates the contract or assigns rights and duties under the agency contract to another person. Termination by Acts of Parties The agency relationship can be terminated following certain acts. Several possibilities are discussed in the following sections. Lapse of Time If an agency agreement specifies that the agency relationship will exist for a certain amount of time, the relationship will end when the amount of time expires.35 For example, an agency agreement might state that the agency relationship will begin on September 1 and end on September 30. Although the agent and principal can agree to

continue the agency relationship through October, they will have to make a new agreement. The agent’s express authority ends when the relationship ends; thus, it is the responsibility of the principal to notify third parties that the former agent no longer has the ability to act on the principal’s behalf. Page 487 Fulfillment of Purpose Suppose a homeowner enters into an agreement with a real estate agent to sell their house. In other words, the very basis for the relationship is a function or purpose—the sale of a piece of real estate. Once the house is sold, the agent no longer has the authority to act on the seller’s behalf. The agent has fulfilled the purpose of the agency relationship.36 Occurrence of a Specific Event An additional means of ending an agency relationship is the occurrence of a specific event. For example, John chooses Claire as an agent to move his bed to another location. Once the move has been made, the agency relationship would terminate. Mutual Agreement by the Parties Remember, agency is a consensual agreement between two parties. Consequently, if the two parties mutually decide they do not wish to continue in the agency relationship, they can cancel the agreement and therefore terminate the agency relationship. Revocation of Authority At any time, a principal can revoke an agent’s authority.37 Again, the basis of agency law is consensual agreement. If the principal does not want the agent to act on their behalf, the principal can revoke the agent’s authority. However, the principal’s revocation might constitute a breach of contract with the agent. Therefore, the principal could be liable for damages due to the breach of contract.38 If the agent has somehow breached their fiduciary duty to the principal, the principal can revoke the agent’s authority without being liable for damages to the agent. Renunciation by the Agent In the same way that a principal terminates an agency relationship by revoking authority, the agent can terminate the agency relationship by renouncing the authority given to the agent. The agent can be liable for breach of contract if the agency agreement has stated a specific amount of time the agency relationship is to exist. Agency Coupled with an Interest An agency coupled with an interest is a special kind of agency relationship. Unlike regular agency agreements, an agency coupled with an interest is created for the agent’s benefit, not for the principal’s. Given that the agent is the one who benefits, an agency coupled with an interest is also known as power given as security. Because the agency arrangement is created to benefit the agent, the principal may not terminate the relationship. Rather, the agency relationship is terminated when an event occurs that discharges the principal’s obligation. Termination by Operation of Law LO 20-8 Outline the ways an agency relationship can be terminated. Certain events lead to automatic termination of the agency relationship. These events may involve

a situation in which the agent is unable to fulfill their task or one in which the principal does not desire to continue with the performance. In addition, automatic termination may occur when further pursuit of the agency relationship's objectives would be illegal. These events are discussed in the following sections. Death If either the principal or the agent dies, the agency relationship is automatically terminated. Even if one party is unaware of the other party's death, the agency relationship no longer exists. Suppose an agent has authority to buy antiques on behalf of a principal. However, without the agent knowing it, the principal dies, but the agent continues to purchase items on behalf of the principal. Those transactions are not binding on the principal's estate because as soon as the principal died, the agent's authority to act ended. Insanity If a principal or agent becomes insane, the agency relationship is finished. Some states have modified this law so that unless the person has been adjudicated insane, the agency contract still exists. Bankruptcy If the principal or agent files a bankruptcy petition, the agency relationship is generally no longer in existence. If the agent is filing for bankruptcy and the agent's credit is important to the agency relationship, the relationship will end. However, if the agent's financial history is not relevant to the agency relationship, the agency may continue. Insolvency, which is defined as the inability to pay debts or the condition of liabilities outweighing assets, does not necessarily result in the termination of the agency relationship.39 Page 488 Changed Circumstances If an unusual change in circumstances leads the agent to believe that the principal's instructions do not apply, the agency relationship terminates.40 For example, suppose Smith contracts someone to act as their agent to sell a painting they found in their great-aunt's attic. Smith authorizes the agent to sell the painting for $5,000. However, in the course of showing the painting to several buyers, the agent learns the painting is a Van Gogh original. Thus, because the painting is worth much more than $5,000, the agent should infer that the principal does not want the original agency to continue. E-COMMERCE and the Law Agents and Electronic Contracts in Singapore Many legislatures have found it necessary to add or create certain laws in response to technology. Singapore, for instance, addressed the growing use of electronic contracts with new legislation in 1997. Because of the possibility of email and electronic fraud, certain risks are associated with forming electronic contracts. The new legislation attempts to combat those risks and specifies the consequences of such fraud. The fourth section of this legislation pertains to the formation of agency contracts. Agency contracts made electronically will be valid and enforceable if the principal or a principal's designated agent sent the contract. As for contracts made

between third parties, certain circumstances must exist for the third party to make the assumption that the electronic record is that of the principal. Either the third party follows a procedure of clarification previously agreed on by the principal or they see the message originated from an agent who has been endorsed by the principal. Under either of these circumstances, the third party is legally allowed to assume that the electronic message originated with the principal. If an agent in Singapore sends an electronic record not approved by the principal, the third party has the right to act as a result of that message. If such actions result in injuries or damages to the third party, the principal is responsible under law. The principal cannot claim that they were unaware of the agent's actions. Although there may have been no actual awareness, Singapore does not recognize the lack of awareness as a defense. Singapore's legislation intends to protect third parties from the poor judgment of principals by creating this direct link between them. Making the principal answerable and liable to the third party increases the pressure to employ reliable agents. Change in Law When a new law is passed subsequent to the formation of an agency agreement that makes the commission of the agency agreement illegal, the agency agreement is terminated. For example, Tyler hires Ryan to paint her house green. Then, after Ryan was hired, the city council passes a law making it illegal to paint one's house green. The new law automatically terminates the agency agreement. Impossibility Suppose that while attempting to sell the painting in our earlier example, there is a fire in Smith's house and the painting is destroyed. Because it is impossible for the agent to sell the painting, it is impossible for the agency relationship to continue.41 In addition, if the agent loses qualifications needed to perform duties for the principal, the agency relationship ends because of impossibility. For example, Jackson hires a lawyer to serve as his agent. However, the lawyer has unfortunately engaged in a series of illegal actions and is disbarred. Because the lawyer can no longer fulfill the functions Jackson has authorized them to perform, the agency relationship is terminated. Page 489 Disloyalty of Agent An agency agreement is terminated whenever the agent, unknown to the principal, acquires an interest against the principal's interest. The agency agreement is also terminated if the agent breaches the duty of loyalty they have to the principal.42 For example, Mary is an attorney representing Lola in her suit against a pharmaceutical company. If the pharmaceutical company offers Mary a job and she accepts, the agency agreement would terminate because Mary has acquired an interest opposed to Lola's interests. War A principal has an agent in Iran authorized to conduct business dealings on the principal's behalf.43 If the United States goes to war with Iran, this

agency relationship will no longer exist because there is no way to enforce the rights of the parties. CASE OPENER WRAP-UP FedEx and Independent Contractors Ultimately, the court ruled in favor of FedEx and found that the board's decision was unenforceable because the drivers in question were independent contractors rather than employees. To determine whether the FedEx drivers should be classified as employees or independent contractors, the court applied traditional agency law principles. It discovered that FedEx "may not prescribe hours of work, whether or when the drivers take breaks, what routes they follow, or other details of performance;" drivers "are not subject to reprimands or other discipline;" and the owners of the FedEx stores (called contractors) are responsible for all the costs associated with operating and maintaining their vehicles. Therefore, FedEx does not exercise the degree of control necessary for the relationship to be considered employer–employee. Rather, in this situation, the route drivers are independent contractors who have "significant entrepreneurial opportunity for gain or loss" because they can operate multiple routes, hire additional drivers and helpers, sell routes without permission, and negotiate their price to deliver the packages. Therefore, the rights and duties of employees as agents discussed throughout the chapter do not apply to FedEx drivers. This case illustrates the importance of understanding agency relations and whether a person is an employee or independent contractor. Although FedEx was successful in the case, this case suggests that it is essential for businesses to have knowledge of the kinds of agency relationships involved in their transactions. In the future, your knowledge about agency relationships could save you or your company large amounts of time and money that would have been spent on litigation. PRACTICAL TIPS for Business Managers It is very important to know the distinction between an employee and an independent contractor and whether your agent is an employee or an independent contractor under the law. Several businesses have gotten into major legal disputes for classifying their employees as independent contractors. Properly classifying your agents in the first place and fulfilling the obligations of each distinction will save you a lot of trouble. Once you understand the distinction between an employee and an independent contractor, you must then decide which type of agent will best suit your business needs. Employees tend to provide more reliable work but come with numerous obligations. Independent contractors can be good for temporary jobs, but you must maintain a hands-off approach to how they work. See this chapter's Point/Counterpoint for a more in-depth discussion of the pros and cons of employees and independent contractors. Remember that an agency relationship is a two-way street. You owe your agent certain

duties as a principal, but the agent also owes certain duties to you. As with most agreements, it is wise to have a written agency contract that lays out these duties and provides options for settling any disputes.

SUMMARY Introduction to Agency Law Agency: The relationship between a principal and an agent. Agent: One authorized to act for and on behalf of a principal. Principal: One who hires an agent to represent them. Fiduciary: One with a duty to act primarily for another person’s benefit. Creation of the Agency Relationship Express agency: Agency formed by making a written or oral agreement. Power of attorney: Document giving an agent authority to sign legal documents on behalf of the principal. Durable power of attorney: Power of attorney intended to continue to be effective, or to take effect, after the principal has become incapacitated. Agency by implied authority: Agency formed by implication through the conduct of the parties. Agency by estoppel: Agency formed when a principal leads a third party to believe that another individual serves as their agent but the principal has made no agreement with the so-called agent. Agency by ratification: Agency that exists when an individual misrepresents themself as an agent for another party, and the principal accepts or ratifies the unauthorized act. Agency Relationships An agency relationship is a fiduciary relationship (a relationship of trust) in which an agent acts on behalf of the principal. A principal–agent relationship exists when an employer hires an employee to enter into contracts on behalf of the employer. An employer–employee relationship exists when an employer hires an employee to perform some sort of physical service. An employer–independent contractor relationship exists when an employer hires a person other than an employee to conduct certain tasks. Duties of the Principal and the Agent Principal: Duty of compensation Duty of reimbursement and indemnification Duty of cooperation Duty of safe working conditions Agent: Duty of loyalty Duty of performance Duty of notification Duty of obedience Duty of accounting Rights and Remedies Principal: Constructive trust Avoidance Indemnification Agent: Tort and contract remedies Demand for an accounting Specific performance Authority of the Agent: The Link to the Principal’s Liability Express authority: The principal has explicitly instructed the agent to do something. Implied authority: The relationship is inferred from the conduct of the parties. Apparent authority and estoppel: Apparent agency exists when a third party reasonably believes on the basis of a principal’s actions that an agency relationship exists between the principal and another individual. Contractual Liability of the Principal and Agent Classification of the principal: The principal must be

classified as disclosed, partially disclosed, or undisclosed. Authorized acts: These are acts within the scope of the agent’s authority. Unauthorized acts: These are acts that go beyond the scope of the agent’s authority. Tort Liability and the Agency Relationship Principal’s tortious conduct: The law holds a principal directly responsible for their own tortious conduct under two conditions: (1) the principal directs the agent to commit a tortious act or (2) the principal fails to provide proper instruments and tools or adequate instructions. Agent misrepresentation: If an agent misrepresents themself to a third party, the principal may be tortiously liable for the agent’s misrepresentation. Respondeat superior: The principal/employer is liable not because they were personally at fault but because they negligently hired an agent. Principal’s liability and the independent contractor: An individual who hires an independent contractor cannot be held liable for the independent contractor’s tortious actions under the doctrine of respondeat superior unless the contractor engages in hazardous activities. Termination of the Agency Relationship Termination by acts of parties: This may occur by lapse of time, fulfillment of purpose, occurrence of a specific event, mutual agreement by the parties, revocation of authority, or renunciation by the agent. Termination by operation of law: The agency relationship may be terminated automatically due to death, insanity, bankruptcy, changed circumstances, change in law, impossibility, or disloyalty of the agent.

Point/Counterpoint Should a Business Owner Hire Independent Contractors Instead of Employees? Yes No Although hiring full-time employees for a business is the more traditional route, hiring independent contractors to work for a business has several advantages that can outweigh the benefits of a full-time employee staff. First, hiring independent contractors often saves employers money in the long run. While contractors tend to be paid more per hour, there are several expenses that employers can forgo, such as employer-provided benefits and on-the-job expenses, when hiring contractors. Employers also have to contribute to an employee’s Social Security and Medicare taxes, workers’ compensation insurance, and unemployment insurance. These expenses add up quickly and can be entirely avoided by hiring independent contractors. Second, hiring contractors gives an employer much more flexibility than hiring employees does. Hiring an employee is often intended to be a long-term commitment, and employees often require costly training. Independent contractors can be hired for a specific project and then will leave when the job is finished. This possibility is extremely beneficial to employers with fluctuating workloads as

an employer doesn’t have to deal with firings or layoffs when work is in lower demand. Also, contractors often bring specialized expertise with them, eliminating the need (and the cost) of training that comes with traditional employees. Finally, traditional employees have a wide array of rights guaranteed to them under state and federal laws. These include the right to minimum wage, overtime compensation, unionization, sick leave, and maternity leave. Independent contractors are not entitled to these rights, which can make hiring, firing, and managing contractors a much easier process. Independent contractors also cannot sue their employers for wrongful termination like employees can. (There may be restrictions, however, on the firing of a contractor based upon the contract between the employer and contractor.) Hiring independent contractors does seem to have advantages when compared to hiring full-time employees, but independent contractors also come with several disadvantages that make traditional employees the better choice. First, employers have much less control over an independent contractor than they do an employee. Employers can closely monitor and supervise the work of an employee, but contractors enjoy an extended level of autonomy and can decide for themselves the best way to perform the task the employer has given them. In fact, if an employer interferes too much in the work of an independent contractor, the employer runs the risk of causing the contractor to be considered an employee, which comes with all of the expenses and liabilities that an employer must provide to employees. Second, because of the temporary nature of independent contractors, workers will be constantly coming and going. Not only can this be inconvenient and disruptive, but an employer would not have a steady, dependable workforce. Independent contractors come in with their own skills and experience and can often do things their own way, which can lead to an uneven quality of work. Training a staff of employees can be more expensive, but these employees will do the same job with the same level of quality every day. To ensure a final product with consistent quality that is produced in a consistent amount of time, employers are better off hiring employees. Finally, there are several legal issues that come with the independent nature of contractors that can be avoided with full-time employees. For example, if an employee gets injured on the job, they are usually covered by workers’ compensation. In this situation, an employee gives up their right to sue the company in exchange for receiving benefits. Independent contractors, on the other hand, are not covered by workers’ compensation and therefore can sue an employer if they are injured on the job. Also, based upon the agreement an employer makes with an independent contractor, the employer may not have an unrestricted right to fire a contractor and may not have the rights to

copyrighted material produced by the contractor. Employers have to take extra care when hiring independent contractors that often need not be taken when hiring employees.

Questions & Problems Who can serve as an agent or a principal? What are the similarities and differences between the types of agency relationships? Why is it important to determine whether a worker is an independent contractor or an employee? How is apparent agency, or agency by estoppel, different from express agency? What are the different types of authority an agent might have, and why is it important to identify the type of an agent's authority? When might a principal be liable for torts committed by an agent? Explain how the doctrine of respondeat superior affects agency relationships. Michael Savage was an employee of the City of Memphis Public Works Division who filed an equal protection claim against the City of Memphis after being terminated. The City's Civil Service Commission upheld the termination. Savage subsequently filed a petition for writ of certiorari with the chancery court, which found substantial and material evidence to support the Commission's decision but remanded the case on the equal protection claims. Before the hearing took place, the assistant city attorney, Barbaralette Davis, acting with the approval of the city attorney, contacted Savage to discuss if he would be willing to resolve the dispute through a mediation. Savage agreed to mediate, and the two parties agreed to have former Judge Bernie Weinman serve as the mediator. Prior to the mediation, Judge Weinman informed the parties that each side had to bring someone with the authority to settle to the mediation. The mediation came to a successful close, and the parties reached an agreement to settle for $72,000. Davis had Savage sign the settlement and informed Savage that she would "get the ball rolling on getting the check request routed." The settlement agreement was eventually submitted to the city mayor, AC Wharton, to sign, despite the fact that the settlement agreement did not contain any language to indicate that enforceability of the agreement was subject to the mayor's approval. Wharton rejected the settlement agreement upon reviewing it, saying that he knew nothing about the case, and Savage subsequently filed a petition to enforce settlement. In the lawsuit, Savage asserted that the City of Memphis was bound by the settlement agreement because Davis had authority to settle the matter and that Mayor Wharton had delegated the

authority to Davis. The city argued that it was not bound to the settlement because Davis had no actual or apparent authority to enter the settlement without the mayor’s approval. The trial court granted summary judgment in favor of Savage, and the City of Memphis filed an appeal. How did the appeals court rule? What reasons did the judge give? Do you agree with this reasoning? Source: Michael Savage v. City of Memphis, 464 S.W.3d 326; 2015 Tenn. App. In February 2011, Paula Stenlund traveled to Panama City with her husband. While in Panama City, the Stenlunds were guests at the Panama City Marriott Hotel. Before and during the trip to Panama City, the Stenlunds received Marriott Marketing material that promoted the Royal Casino as being connected to the hotel. Page 493 On February 13, Paula Stenlund visited the Royal Casino. Stenlund followed an employee to locate a place where she could cash her winnings. Stenlund had to descend a set of stairs to reach the redemption area. However, she tripped over an electrical cable draped across the stairway and struck her face, head, and knees. The Royal Casino employee made an effort to provide medical help. While the hotel manager sent a doctor to Paula’s room, the doctor did not provide substantive care. The Stenlunds returned to the United States on February 15 and Paula commenced an action against Marriott International in May. Paula alleged that Marriott International breached various duties it owed to her while staying at the Panama City Marriott Hotel and visiting the Royal Casino. The Panama City Marriott Hotel is owned by Hotel Properties of Panama and the Marriott branding was attached under an agreement between Marriott International and Hotel Properties. In addition, all management at the hotel was done by Marriott International Services, Limited, a company based in Bermuda and separate from Marriott International, in an agreement solely between Marriott Limited and Hotel Properties. In its opposition to Paula’s motion for summary judgement, Marriott International claimed Paula had sued the wrong party. In response, Paula argued that because Marriott International “tightly control[led] virtually every aspect of the [H]otel and [C]asino where Plaintiff was injured,” the level of control demonstrated that an agency relationship existed between Marriott International and Marriott Services. In essence, Paula argued that there was either actual agency or apparent agency between the two Marriott companies. In this case, the court determined that it did not matter whether Panama law or Maryland law applied because the result would be the same. What did the court decide and why? Describe the court’s reasoning for both the actual agency count and the apparent agency count. Source: Stenlund v. Marriott International, Inc., 172 F. Supp. 3d 874 (2016). Kenneth Kinney and Kathleen Gallagher were in a personal relationship during which they agreed

to purchase a house. While the couple did buy the house together, Kinney's name was not on the deed because he was participating in a tax repayment agreement with the IRS due to previously owed taxes. The couple separated in January 2005. In August 2005, Kinney filed an action against Gallagher in the New York State Court, alleging that he and Gallagher had orally agreed to put Kinney's name on the deed because he had allegedly contributed $10,000 for the down payment of the house. In October 2007, Gallagher filed a voluntary Chapter 7 petition with the bankruptcy court. She listed Kinney as a holder of an unsecured claim and her attorney instructed Kinney's attorney to terminate the state court action because of the automatic stay established by the bankruptcy court. Although Kinney was listed on the schedule of debts, he did not file a claim for assets during the bankruptcy proceeding and therefore did not receive any distribution of funds from the estate. In January 2008, Gallagher was granted a discharge of debts, and the bankruptcy case was closed in December 2011 after the trustee completed the administration of estate assets. Despite the discharge of debts, Kinney continued the state court action, and, on October 3, 2013, Gallagher filed a motion for contempt against Kinney, asserting that the continuation of the state action was a violation of the Chapter 7 discharge. Kinney argued that he was not a creditor because his action was based on a constructive trust for the return of property. The court explains the four elements of a constructive trust. What are they? What scenarios would a constructive trust based on these elements be relevant in a principal–agent relationship? How did the court rule and why? Source: Kenneth C. Kinney v. Kathleen M Gallagher, 524 B.R. 455; 2015 U.S. Dist. This case arises from a principal appealing the damages it was awarded by a court from its agent. The defendant William Pompa had breached his duty of loyalty to plaintiff Wall Systems, Inc., by working for both Wall Systems and a competitor at the same time. Pompa also accepted three kickbacks from subcon-tractors in connection with his work for Wall Systems. As part of the remedy, the trial court also placed a constructive trust on a joint bank account held by Pompa and his wife Jill Pompa. During the appeal, Jill Pompa asserted that the trial court had erred in putting a constructive trust on the joint bank account. What is a constructive trust and under what conditions may a court impose one? Wall Systems acknowledged that while there was no evidence that William Pompa had deposited the profits he received from his disloyal activities, "that it is fair to infer that he did, because the defendant testified that he deposited his paychecks from MK Stucco there, and there was no evidence that he and Jill Pompa had other bank accounts." Is this argument enough to show that the trial court was correct? Source: Wall Systems, Inc. v.

Pompa, 154 A. 3d 989 (2017). Page 494 Livejournal is a social media platform that allows users to create thematic communities by posting content and comments. LiveJournal has three types of unpaid administrative roles to manage the communities, “moderators,” “maintainers,” and “owners.” All three roles review member posts and remove them if they violate community rules. However, “maintainers” can appoint and remove “moderators” while an “owner” can appoint and remove both “moderators” and “maintainers.” In addition to the three unpaid roles, LiveJournal sometimes hires people to work as head moderator of sorts for certain communities. In 2010, LiveJournal hired and appointed Brendan Delzer as the “head leader” of its most popular community, “Oh No They Didn’t!” (ONTD). Delzer’s job was to grow the site and run ads while fulfilling moderator duties. Several years after Delzer’s appointment, Mavrix, a company that spe-cializes in candid photos of celebrities, sued LiveJournal for copyright infringement of 20 photos posted on ONTD between 2010 and 2014. LiveJournal presented a defense under § 512(c) safe harbor of the Digital Millennium Copyright Act. Under this statute, a service provider like LiveJournal must show it can meet the threshold requirement that the copyrighted material was posted “at the direction of a user” before proceeding to the next step of the defense. At the heart of the threshold requirement is whether the unpaid moderators are considered to be LiveJournal’s agents. While Mavrix’s assertion that the unpaid moderators were LiveJournal’s agents, the appellate court ruled that there was a genuine issue of fact on the question of the moderator’s agent status. What are the possible arguments Mavrix could make to assert that the moderators are LiveJournal’s agents? What information or evi;dence is needed to show unpaid moderators had an agency relationship with LiveJournal? What evidence would be sufficient? Source: Mavrix Photographs, LLC v. LiveJournal, Inc., 853 F. 3d 1020 (2017).